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No. 93-1591

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSE DELGADO GARCIA AND SONYA DELGADO,
PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR FIRST CITY, TEXAS—HOUSTON, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court denied petitioners due process by directing a verdict in favor of respondents.

2. Whether the decision of the court of appeals should be reversed because the court of appeals did not write an opinion explaining its decision to affirm the district court.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A9-A10) is unreported, but the judgment is noted at 12 F.3d 209 (Table). The order of the district court adopting the judgment of the state court (Pet. App. A6-A8) and the judgment of the state court (Pet. App. A2-A5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1993. A petition for rehearing was denied on

January 6, 1994. Pet. App. A11-A12. The petition for a writ of certiorari was filed on April 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 22, 1988, petitioners executed a promissory note payable to First City National Bank of Houston, in the original principal amount of $50,000, as well as a deed of trust securing repayment of the note. After determining that petitioners were in default under the note, First City posted the collateral for foreclosure. Petitioners responded by filing suit in a Texas state court claiming breach of contract, violations of the Texas Deceptive Trade Practices Act, fraud, and intentional and negligent infliction of emotional distress. First City counterclaimed to recover the $50,000 due on the note. Petitioners then asserted defenses of failure of consideration, unclean hands, waiver, equitable estoppel, breach of contract, fraud, and business homestead. See Plaintiffs' First Amended Original Petition; Counterclaim of Defendant First City; Cross-Defendants' First Amended Original Answer.

2. At a jury trial, petitioners produced the note, identified their signatures on it, testified that they received the full $50,000 from First City, and conceded making just two small interest payments and no principal payments to First City. See Pet. 1-2; Resp. C.A. Br. 10-11.

At the close of petitioners' evidence, First City made an oral motion for a directed verdict, initially styled a "judgment on the pleadings" or "judgment on the $50,000," as to petitioners' affirmative claims and First City's counterclaim. V Statement of Facts 632. First City argued that the evidence presented by petitioners

not only failed to prove petitioners' affirmative claims or affirmative defenses, but established First City's counterclaim by admitting that petitioners had received the money represented by the note and had not repaid it. *Id.* at 632-634. Petitioners objected, arguing that First City improperly was seeking a "summary judgment hearing of some type." *Id.* at 635. The court stated: "There was no summary hearing that I know about," and allowed First City to proceed. *Ibid.*

First City then reiterated its view that the proof included an admission that petitioners had received the $50,000 and argued that petitioners' failure to plead a defense of payment entitled First City to judgment on the note. V Statement of Facts 635. Petitioners in turn argued that they had pleaded a defense of failure of consideration. *Ibid.* First City responded that the plea of failure of consideration was conclusively rebutted by the evidence establishing that petitioners had received the entire balance of the note. *Id.* at 636. At that point, the court indicated that it would "let [petitioners] tell the court in [their] view of [*sic*] why [First City's] motion for a judgment for $50,000 shouldn't be granted." *Ibid.* Petitioners reiterated their reliance on the plea of failure of consideration, and argued that First City had not adequately made out its case. Petitioners' counsel concluded by stating: "He needs to make his case, but if he didn't want to, why, we'll stand on our evidence as it is." *Id.* at 637.

After satisfying itself that First City was seeking a judgment only for the $50,000 of which petitioners had acknowledged receipt (and not for interest or attorney fees), the court offered petitioners another opportunity to proceed. V Statement of Facts 637-639. Petitioners' counsel again stated: "Your honor, we stand on our previous arguments." *Id.* at 639. The court then granted

First City's motion, stating: "Nothing further offered, the defense motion on their cross-action for the amount of the note, original amount of the note, $50,000 is granted." *Ibid.*

The court entered a final judgment on May 4, 1992, in which it characterized First City's motion as a "Motion for Directed Verdict," ordered that petitioners take nothing on their claims, and entered judgment in favor of First City in the amount of $50,000. Pet. App. A2-A5. On August 2, 1992, petitioners filed an appeal with Texas's Court of Appeals for the Thirteenth District, located in Corpus Christi, Texas. Pet. C.A. App. Tab 5.

3. On October 30, 1992, the Comptroller of the Currency declared First City insolvent and appointed the Federal Deposit Insurance Corporation as receiver. That same day, the receiver transferred the note petitioners had executed to New First City, Texas—Houston, N.A. When that institution subsequently failed, the note was transferred to respondent Texas Commerce Bank, N.A. On December 4, 1992, the receiver removed this case to the United States District Court for the Southern District of Texas. See Resp. C.A. Br. 4-5; Pet. C.A. App. Tab 8.

4. On December 2, 1993, the district court adopted the state court judgment as its own. Pet. App. A6-A8 (citing *5300 Memorial Investors, Ltd.* v. *RTC* (*In re 5300 Memorial Investors, Ltd.*), 973 F.2d 1160 (5th Cir. 1992)).[1]

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[1] In the *5300 Memorial* case, the Fifth Circuit held that a federal district court to which a case is removed from state court should "take the state judgment as it finds it." 973 F.2d at 1162. In a case already on appeal in the state courts before removal, the federal district court should "prepare the record as required for appeal, and forward the case to a federal appellate court for review." *Ibid.*

5. The court of appeals affirmed without opinion. Pet. App. A9-A10.

ARGUMENT

1. Petitioners first argue (Pet. 6-13) that the state trial court deprived them of due process by "employ[ing] devices unknown and unauthorized under state law" (Pet. 6-7). The state court's procedures, however, were entirely appropriate under Texas law. To be sure, it was not appropriate for First City to rely on evidence petitioners had introduced at trial to support a motion for a judgment on the pleadings. But it was entirely appropriate for the state court to treat the motion as a motion for an instructed or directed verdict under Tex. R. Civ. P. 268. See Tex. R. Civ. P. 71 ("Misnomer of Pleading: When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated."); see *State Bar of Texas* v. *Heard*, 603 S.W.2d 829, 833 (Tex. 1980) ("We look to the substance of a plea for relief to determine the nature of a pleading, not merely at the form of title given to it."). Petitioners offer no reason for supposing that the Due Process Clause prohibits a practice of evaluating motions based on their substance rather than the name by which counsel describes them.

Nor did the trial court act improperly in treating the motion in this case as a motion for an instructed verdict. The motion was made after petitioners completed presentation of their case. It relied on evidence introduced in petitioners' presentation to support First City's contention that the record, viewed in light of

applicable principles of Texas law,[2] conclusively established First City's right to judgment on its counterclaim. Furthermore, the trial court repeatedly gave petitioners' counsel an opportunity to rebut the legal argument made by First City. When petitioners could do nothing except rely on a defense that the trial court apparently found legally insufficient, it was appropriate for the trial court to grant judgment for First City rather than continue with the trial. See *Oldham* v. *Thomas*, 864 S.W.2d 121, 125 (Tex. Ct. App.—Houston 1993) (discussing standard for directed verdict under Texas law), writ of error granted (Apr. 20, 1994).

2. Petitioners also contend (Pet. 13-22) that the court of appeals denied them due process by disposing of the case without issuance of an opinion, arguing that the case does not fit the criteria for summary disposition articulated in Fifth Circuit Rule 47.6. That contention is frivolous. Among other things, that rule permits affirmance without opinion where "the evidence in support of a jury verdict is not insufficient." 5th Cir. R. 47.6(2). An interpretation of the rule to preclude summary disposition in cases where a trial court directs a verdict would serve no purpose. Appellate courts

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[2] First City relied on Tex. R. Civ. P. 95, which provides that a party must make a specific plea of payment if it wishes to defend against a suit on a note by arguing that it already has repaid the note. Because petitioners had not made such a plea, and because they had introduced the note itself into evidence and had acknowledged that they had signed the note and received the principal balance described in it, First City argued that Texas law mandated a judgment in its favor. See Tex. Bus. & Com. Code § 3.307(b) (Vernon 1968) (holder of note entitled to judgment if maker admits signatures and holder produces instrument, unless maker establishes defense). The petition does not challenge that interpretation of Texas substantive law.

frequently conclude that a trial court correctly determined that the evidence warranted a directed verdict; the fact-specific nature of such a determination makes it likely that in many cases appellate affirmance of such a disposition will establish no legal principles of general importance.

In any event, whatever the merits of the court of appeals' interpretation of its own local rule, it is completely implausible to suppose that the failure of the court of appeals to issue an opinion denied petitioners due process. The courts of appeals "have wide latitude in their decisions of whether * * * to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). Given petitioners' failure to articulate any basis for doubting the correctness of the decision of the court of appeals, there is no reason to believe that the summary nature of the disposition prejudiced petitioners in any way.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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